Chong Wooi Leong & Ors v Lebbey Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-407 OF 1997
NH CHAN, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
20 JANUARY 1998

Land Law *— Licence — Equitable estoppel — Consent or licence to occupy state land — Whether consent could only come from the Ruler or Governor — Whether licence or consent from any other person would be sufficient to amount to estoppel against party succeeding the State Authority in title — National Land Code 1965 ss 5 & 40*

Land Law *— Crown/State land — Consent or licence to occupy state land — Whether consent could only come from the Ruler or Governor — Whether licence or consent from any other person would be sufficient to amount to estoppel against party succeeding the State Authority in title — National Land Code 1965 ss 5 & 40*

The State Executive Council of Selangor approved and alienated a piece of land totalling in area 31.66 acres ('the land') to the respondent. At the material time, the 30 appellants ('the appellants') were among more than 100 other people occupying houses built on the land. As occupiers, they had access to piped water, electricity and even a village mosque. The appellants refused the respondent's offer of out of court ex gratia payments to vacate from their plots and had physically obstructed the respondent from commencing work on the land. The respondent applied to the High Court for an order against the appellants to vacate the land and also for an injunction to restrain the appellants from entering, remaining, and erecting and occupying structures on the land. The Court of Appeal, in overturning the High Court's decision, held that there were triable issues in this case (see [1997] 2 MLJ 4) and directed the matter to trial. The matter consequently went for trial before the High Court. In their defence, the appellants averred that they had occupied the land lawfully as irrevocable licencees with equity since 1981 with the consent and acquiescence from the Selangor State Government and that they had acquired a right in equity to be compensated. Evidence was also tendered that a number of politicians had also at election time promised that they would be given a temporary occupation licence. Based on that promise, it was alleged that a committee of residents had actually applied for the licence and in consequence, an equitable estoppel arose against the respondent in succeeding the State Authority in title as they could not be entitled to possession until the equity of the appellants had been satisfied. The learned trial judge decided in favour of the respondent, hence this appeal.

Held, dismissing the appeal with costs:

Section 40 of the National Land Code 1965 ('the Code') vests solely in the State Authority the entire property in all State land within the territories of the State the rights to which have not been specifically disposed of by the State Authority. The definition in s 5 of the Code

further denotes that the consent or licence can only come from the Ruler or Governor, as the case may be, and as the land here is situated in the State of Selangor, it must mean the Ruler. A licence or consent from any other person, therefore, certainly would not suffice. In these circumstances, it was clear that all promises made to the appellants, who had never been given any temporary occupation licence by the State Authority, in whatever manner, by either the district officer, village headman, elected representative or the like, indicating that they had a right to occupy or continue to occupy the land, fell short of the requirement of the licence and consent from the State Authority as defined in s 5 of the Code (see pp 658E–F, H–I and 659A, H–I); *Lee Suat Hong v Teo Lye* [1988] 2 MLJ 537 distinguished; *Sidek bin Haji Muhamad & Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313 followed.

[Bahasa Malaysia summary

Majlis Eksekutif Negeri Selangor telah meluluskan dan memberimilik sebidang tanah seluas 31.66 ekar ('tanah tersebut') kepada penentang. Pada masa yang material, 30 perayu ('perayu-perayu') adalah di antara lebih daripada 100 orang lain yang menduduki rumah yang didirikan atas tanah itu. Sebagai penghuni, mereka mempunyai akses kepada air paip, elektrik dan juga sebuah masjid kampung. Perayu-perayu telah menolak tawaran penentang untuk menyelesai melalui bayaran ex gratia luar mahkamah untuk keluar dari plot-plot mereka dan telah menghalang penentang secara fizikal daripada memulakan kerja-kerja atas tanah tersebut. Penentang memohon kepada Mahkamah Tinggi untuk satu perintah terhadap perayu-perayu supaya keluar dari tanah tersebut dan juga untuk satu injunksi untuk menahan perayu-perayu daripada memasuki, menetap dan mendiri dan menduduki struktur-struktur pada tanah tersebut. Dalam mengubah keputusan Mahkamah Tinggi, Mahkamah Rayuan memutuskan bahawa terdapat isu untuk dibicarakan dalam kes ini (lihat [1997] 2 MLJ 4) dan mengarahkan hal itu dibicarakan. Hal itu kemudiannya dibicarakan di hadapan Mahkamah Tinggi. Dalam pembelaan, perayu-perayu menegaskan bahawa mereka telah menduduki tanah dengan sahnya sebagai pemegang lesen tak boleh batal dengan ekuiti sejak tahun 1981 dengan kebenaran dan akuiesens daripada Kerajaan Negeri Selangor dan bahawa mereka telah memperolehi hak dalam ekuiti untuk diberi pampasan. Keterangan juga telah dikemukakan bahawa pada masa pilihanraya sekumpulan ahli politik juga telah berjanji bahawa mereka akan diberikan lesen pendudukan sementara. Berdasarkan janji itu, ia dikatakan bahawa sebuah jawatankuasa penghuni benar-benar telah memohon lesen itu dan akibatnya, estopel ekuiti telah berbangkit terhadap penentang dalam menggantikan hakmilik Pihak Berkuasa kerana mereka tidak patut berhak mendapatkan pemilikan sehingga ekuiti perayu-perayu telah dipenuhi. Hakim perbicaraan yang arif telah memutuskan memihak kepada penentang, dengan itu rayuan ini dibuat.

Diputuskan, menolak rayuan dengan kos:

Seksyen 40 Kanun Tanah Negara 1965 ('Kanun tersebut') meletakhak hanya kepada Pihak Berkuasa semua harta dalam semua tanah Kerajaan dalam wilayah negeri itu yang hak kepadanya belum lagi dilupuskan oleh Pihak Berkuasa Negeri. Takrifan dalam s 5 Kanun tersebut selanjutnya menandakan bahawa kebenaran atau lesen hanya boleh diperolehi daripada Raja atau Gabenor, mengikut mana-mana yang sesuai, dan oleh kerana tanah di sini terletak di Negeri Selangor, ia mestilah bermakna Raja. Maka lesen atau kebenaran daripada sesiapa yang lain sesungguhnya tidak memadai. Dalam keadaan-keadaan ini, adalah jelas bahawa semua janji yang dibuat kepada perayu, yang tidak pernah diberikan sebarang lesen pendudukan sementara oleh Pihak Berkuasa Negeri, dalam apa cara sekalipun, sama ada oleh pegawai daerah, ketua kampung, wakil yang dilantik atau yang seumpamanya, yang menunjukkan bahawa mereka berhak menduduki atau terus menduduki tanah tersebut, tidak memenuhi keperluan lesen dan kebenaran daripada Pihak Berkuasa Negeri seperti yang ditakrifkan dalam s 5 Kanun tersebut (lihat ms 658E–F, H–I dan 659A, H–I); *Lee Suat Hong v Teo Lye* [1988] 2 MLJ 537 dibeza; *Sidek bin Haji Muhamad & Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313 diikut.]

Notes

For cases on Crown/State land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1680–1705.

For a case on equitable estoppel, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1986.

Cases referred to

Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor [1991] 1 MLJ 343 (refd)

Devi v Francis [1969] 2 MLJ 169 (refd)

Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & Ors; Lesco Development Corp Sdn Bhd v Yap Chong Lan & Ors [1984] 2 MLJ 123 (refd)

Lebbey Sdn Bhd v Chong Wooi Leong & Anor [1994] 3 AMR 2205 (refd)

Lee Suat Hong v Teo Lye [1988] 2 MLJ 537 (distd)

Mok Deng Chee v Yap See Hoi & Ors [1981] 2 MLJ 321 (refd)

Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1) [1997] 2 MLJ 1 (refd)

Salim bin Ismail & Lain-lain lwn Lebbey Sdn Bhd (No 2) [1997] 2 MLJ 4 (refd)

Sidek bin Haji Muhamad & Ors v The Government of the State of Perak & Ors [1982] 1 MLJ 313 (folld)

Siew Soon Wah & Ors v Yong Tong Hong [1973] 1 MLJ 133 (refd)

Legislation referred to

National Land Code 1965 ss 5, 12(1), 13, 40, 64
Rules of the High Court 1980 O 14, O 18 r 19, O 89, rr 1, 3(b)
Selangor State Constitution cll 50, 55

Appeal from: Suit No 22–264 of 1994, 22–50 of 1994 and Originating Summons No 24–69 of 1994 (High Court, Shah Alam)

R Sivarasa (*Yasmeen Shariff* with him) (*Mahani Hamid & Yasmeen*) for the appellants.

VS Viswanathan (*TH Su & Co*) for the respondent.

Abdul Malek Ahmad JCA (delivering judgment of the court): The land in question here, totalling in area 31.66 acres and bearing particulars HS (D) 34221 PT No 30186 Mukim of Ampang, District of Ulu Langat, Selangor, was previously owned by the State of Selangor. On 26 August 1992, the State Executive Council approved the respondent's application for alienation of the said land subject to the conditions set out in a letter dated 8 October 1992 by the Ulu Langat District Office. A second letter from them to the respondent dated 15 January 1993 defined precisely the area to be alienated through a survey plan. The respondent was issued with the qualified title on 14 June 1993.

At the material time, the 30 appellants here were among more than a hundred other people occupying houses built on the said land. Negotiations had taken place between the respondent and the occupiers after the alienation as the respondent was keen to develop the said land into a residential, industrial and commercial estate as soon as possible. The respondent alleged that the occupiers were residing on the land unlawfully.

A number of the occupiers took the respondent's offer of out of court ex gratia payments to vacate from their plots but for the reluctant remainder, the last demand was by notice to quit dated 17 January 1994. The settlement terms fell under three schemes, two of which were for Malaysians and the third for non-Malaysians. The first scheme for Malaysians came with a low cost flat costing RM25,000 where the respondent would bear RM2,500 as down payment. In addition, the respondent would pay RM1,000 as relocation fee, RM3,000 as rental and RM20 for each child monthly as bus fare pending the completion of the low cost flat, free legal fees for the sale and purchase agreement and loan agreement, if required from financial institutions, and all water and electricity deposits for the low cost flat.

The second scheme for Malaysians was a RM6,000 cash payment each in lieu of a low cost flat. For the non-Malaysians, the third scheme was a flat cash payment of RM1,500 each.

On 11 and 12 April 1994, the respondent's solicitors and other agents were on the land with a view to implementing the demolition works on some of the vacated houses when the appellants obstructed them from doing so by approaching them in a threatening manner, pointing their fists at them and harassing them into leaving the houses untouched.

Despite being put in grave apprehension of their personal safety, the respondent's agents managed to complete the demolition works but on 22 May 1994, when they went to implement the debris clearing works, they were physically assaulted and the works were left uncompleted. As a result, they had refused to go to the land at all.

In the consequence, the respondent had suffered loss and damage as they cannot commence the housing development with immediate despatch. They also have to bear the brunt of paying interest for the loans due to the delay and aggravated liquidated damages for late delivery to the purchasers.

The respondent, by way of two civil actions (Shah Alam High Court Civil Suit No 22–264–94 and Shah Alam High Court Civil Suit No 22–50–94) against the occupiers whose names were known, and by way of originating summons (Shah Alam High Court Originating Summons No 24–69–94) against those occupiers whose names were not known, applied to the High Court to get them to vacate the land under O 89 of the Rules of the High Court 1980 ('the Rules') and also for an injunction to restrain the appellants from entering, remaining, and erecting and occupying structures, on the land.

It would be appropriate at this stage to recapitulate the sequence of decisions as regards the three actions starting from the High Court decision on 26 August 1994 in *Lebbey Sdn Bhd v Chong Wooi Leong & Anor* [1994] 3 AMR 2205 where Mahadev Shankar J (as he then was) granted the plaintiff's application for an injunction with certain variations and costs, ordered an early trial of all three actions, did not consider the application for leave to appeal as it was then the exclusive preserve of the Court of Appeal, and dismissed the application for stay of execution.

The facts of the matter were well laid out by the learned trial judge as follows (at pp 2208–2209):

> When the defendants entered the said land, they knew it was State land. They did so without the express consent of any person in authority.
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> Over a period of time, numerous other persons occupied other parts of the said land.
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> By 1991, more than 150 houses had been erected on this land. At no time material to any of the actions filed by Lebbey had any of these occupants paid any quit rent, licence fees, or other consideration for being allowed to occupy the land. There is no evidence whatsoever to suggest that the structures they put up were built in accordance with any plans passed by the relevant authorities. A number of these houses including those of the defendants obtained electricity and water supply from the Lembaga Letrik Negara and the Jabatan Bekalan Air Selangor. The defendants say the area they collectively occupy is known as Kampung Ampang Campuran.
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> There are public telephones in this kampung and a community hall and a surau. They claim to have voted in the General Election in 1990. On or about 10 January 1991, a fire razed about 40 houses in the kampung. The defendants claim that with the verbal permission of the District Officer Hulu Langat, these houses were rebuilt.
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> The big picture here is a thriving community whose existence must have been known to every person in authority charged with the responsibility

of land administration in the Mukim of Ampang. Being state land, the boundaries of this kampung were not defined. The problem which this court has now been asked to solve may never have arisen if the defendants had applied to the relevant authorities for the land they occupied to be alienated to them. That way, the authorities could have legitimised their occupancy at least as lessees or as holders of temporary occupation licences or at the very lowest as approved applicants. In this regard, these occupants did nothing, lived off the land free of charge, and now claim that by virtue of their gratuitous occupation they acquired an irrevocable licence to remain on the said land in perpetuity.

In coming to his conclusion, he said (at p 2214):

As to the balance of convenience, the weight on the defendants' side of the scales is the dilution of their bargaining power, as the moderates vacate leaving the hard core to dig in and hold out to the bitter end. I can readily see a question to be tried if what is in contest is the quantum of their compensation and the length of notice to vacate. As to the alleged irrevocable licence extending beyond their houses to the limits of what they perceive to be their kampung territory, I have serious doubts as to its arguability. This question of law which I do not have to decide now, could dispose of the whole case because the material facts are common ground. If the proceedings are not to be needlessly delayed, the parties are at liberty to apply to have it dealt with in the O 14 proceedings or in the originating summons. For the moment, let me say that the licence claimed, if there was one at all, must in the nature of things, be from the State Authority. By inference, this alleged licence was terminated when the said land was alienated to Lebbey. Maybe the occupants had a better moral claim to this land being alienated to them. Maybe their incapacity to pay large sums to the powers that be should have been outweighed by their long occupation of the said land. Maybe they should therefore have been chosen as alienees of the said land instead of Lebbey who could pay, did pay, and are still paying the State Authority. Much as I sympathise with the plight of these people, the question as to whether the land should have been alienated to the defendants is an exercise in futility because there is no evidence that the defendants applied for alienation. There is also no evidence that they appealed to the State Authority when their alleged irrevocable licence was effectively revoked by the alienation to Lebbey. Nor have they challenged the validity of this alienation in any way.

The perspectives of the balance of convenience from the plaintiff's view point is that time is not on their side. These developments are capital intensive projects and delays could seriously prejudice the orderly progress of the scheme. Nor has the plaintiff been backward in its offers to resettle the occupants. I hold that evidence of concluded settlements is admissible, and the fact that 146 occupants have agreed to vacate is not irrelevant. The defendants and the occupants they represent, with respect, are not the kind of people who can compensate Lebbey for the financial losses it will suffer if the works are held up indefinitely. The plaintiff on the other hand has given the usual undertaking. It is also to be observed that the defendants are not debating length of notice or the quantum of the compensation offered by Lebbey. They have taken up a rigid stance of saying that the plaintiff cannot go on to the vacated sites altogether and that is not a proposition this court can lawfully countenance.

Subsequently, the plaintiff applied for a six month extension for the order made on 26 August 1994 while the defendant applied to vary that same order. On 20 October 1994, the Shah Alam High Court (Abdul Wahab Patail JC, as he then was,) dismissed the applications.

Then, on an application by the plaintiff for summary judgment against the defendants under O 14 of the Rules in Shah Alam High Court Civil Suit No 22–50–94 heard together with Shah Alam High Court Originating Summons No 24–69–94, for vacant possession, an injunction and damages, the High Court (James Foong J) on 7 April 1995 concluded as follows:

> After careful perusal of the affidavits filed by both parties, this court finds the defendants have no defence to the plaintiff's claim. They are squatters simpliciter attempting to create a right. They entered the state land without any permission from the State Authority of Selangor, the previous owners of the said land before alienation, and neither did the plaintiff granted them permission to be on the said land. There are no evidence of any temporary occupation licence issued to the defendants nor were there any form of permission or consent granted by the State Authority of Selangor or the plaintiff to the defendants to enter and remain on the said land. The supply of electricity, water and telephone does not amount to a right to occupy the said land neither does the existence of a surau, balai raya and kindergarten erected by the residents themselves on the said land. Numbers given by the Census and the Statistics Department are mainly for the purpose of obtaining information. These numbers do not come with it a right on the said land. This similarly applies to a visit by a religious officer to the surau. As for the permission to rebuilt after the fire, this is only a bare allegation unsupported by any substantiating evidence. No plans were ever submitted nor written approval obtained from relevant authorities. Just by rebuilding squatter houses does not create a right over the said land.
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> From the facts revealed by the defendants themselves, this court finds the defendants had neither entered the said land lawfully, were tenants or licencee, or licencee holding over whether express or implied on the said land. There is no triable issue in this case and as such the plaintiff should be entitled to its prayers as contained in this application with cost.

The application for a stay of execution went before the Court of Appeal (Siti Norma Yaakob, Mahadev Shankar JJCA and Abdul Malek Ahmad J) which on 14 August 1995 in *Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1 held that in deciding whether to grant a stay, the court had to balance the financial repercussions which would be suffered by Lebbey, with the imminent destruction of the homes of the applicants if the orders appealed against were enforced. The destruction of the applicants' right to stay in their homes until their claims had been finally disposed of in a full trial could not be adequately compensated with money. This was a special reason why a stay should be granted. The court therefore granted a stay, but directed that the appeal record be filed within seven days from the date of the court's order.

The appeal proper was allowed by this court (Siti Norma Yaakob, VC George and Ahmad Fairuz JJCA) on 20 September 1996 in *Salim bin Ismail & Lain-lain lwn Lebbey Sdn Bhd (No 2)* [1997] 2 MLJ 4 which decided as follows (at p 6):

A The summary procedure under O 89 is governed by the same principles as those under O 14 of the RHC. To entitle a defendant to a trial, all he needs to do is to show that there is a triable issue of law or fact. It is only in clear cases of tresspass that a summary order can be made under O 89; *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89 followed.

B Order 89 would not be the proper procedure to use if the occupation of the land is with the continuing consent, whether implied or expressed, of the state authority. For the purpose of the summary procedure, a distinction should be made between tresspassers simpliciter who have no rights whatsoever, and occupiers with licence or consent; *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 followed.

C Based on the authorities and the facts contained in the affidavits of the appellants and the respondent, it was clear that the appellants — if they were not given permission to occupy the land by the state authority — had committed an offence under s 425(1) of the National Land Code 1965, ie by illegally occupying government land. However, government departments and agencies had provided public amenities to them. Indeed, the district officer had given consent to the appellants to rebuild their houses that were D destroyed in a fire. With the availability of such evidence, an issue was raised as to whether the conduct of the government agencies could be interpreted as consent of the state authority. This was a triable issue. Thus, the procedure under O 89 was not appropriate to be used by the respondent. Therefore, the court allowed the appellants' appeal and also directed that the originating summons be converted into a writ action and all affidavits be E treated as pleadings.

The matter consequently went for trial before the Shah Alam High Court where Abdul Wahab Patail J decided in favour of the respondent on 3 July 1997. Hence this appeal.

F In their defence, the appellants averred that they had occupied the land lawfully as irrevocable licencees with equity since 1981 with the consent and acquiescence from the Selangor State Government in particular the District Officer, Ulu Langat Land Administrator, the Penghulu Mukim Ampang, and other government officers which gave them the impression that they could remain on the land as long as they wished.

G They had expended thousands of ringgit and spent time, energy and strength to develop their respective lots which was originally a rubbish dump site and swampland. On their application, the Federal and State Governments had provided electricity, water, tarred roads, village mosque, registered kindergarten, telephones and community hall.

H They had even, as registered owners, elected their local representative and their houses had been included in the census exercise carried out by the Department of Statistics. They explained that they were against the demolition works carried out by the respondent as the demolition of the houses occupied by one of the appellants on higher level would result in the destruction of the village mosque and two other houses on lower level I apart from causing flood due to one of the drains being blocked. They also alleged that one of the respondent's agents had exhibited a samurai sword and injured one of the appellants in the process.

The learned trial judge stated that the registered owner of any land is prima facie entitled to possession of it and any person claiming a right of occupation against such registered owner bears the burden of proving such right on a balance of probabilities.

Learned counsel for the appellants argued that they had acquired a right in equity to be compensated and that the respondent, taking the land with full knowledge of the appellants occupying the said land, therefore becomes subject to that right. In short, he stressed that the respondent takes the land subject to the appellants' equity. He further maintained that the State Authority took the easy way out by passing the land to the respondent.

The appellants contended that they had entered upon the land in 1981 with the consent or licence of the State Authority and had enjoyed peaceful enjoyment and occupation of the said land without any interference from the State despite the land being State land. As occupiers, they had access to piped water, electricity and even a village mosque. In addition, after a fire in 1991, the district officer allowed those occupiers affected to rebuild their houses.

A number of politicians had also at election time promised that they would be given a temporary occupation licence. Based on that promise, a committee of residents had actually applied for the licence and in the consequence, an equitable estoppel arose against the respondent in succeeding the State Authority in title as they cannot be entitled to possession until the equity of the appellants had been satisfied.

To support their contention, learned counsel for the appellants had referred to the Singapore case of *Lee Suat Hong v Teo Lye* [1988] 2 MLJ 537. He argued that as the appellants had acquired an equity by acquiescence that must be satisfied before the respondent can be entitled to possession. The learned trial judge was of the view that that case was of no assistance as it was between two private parties.

In that case, the plaintiff claimed against the defendant for possession of premises known as No 38A Lorong Puntong, Singapore ('No 38A') together with arrears of rent and mesne profits from 1 February 1983 and costs. The plaintiff alleged that the defendant's tenancy of the premises had been duly determined by notice to quit expiring on 31 January 1983.

The defendant claimed that the plaintiff was estopped from denying the plaintiff's right to remain in occupation for as long as the defendant and her family deemed fit. The defendant alleged that the plaintiff's predecessor in title of the premises (No 38A) had represented to the defendant and her family that if they were to give up possession of Lot 234 Mukim 15, of which the defendant claimed to have been protected tenants under the Control of Rent Act, the defendant and her family would be allowed to erect their own house on the present premises and to remain in occupation for as long as they deemed fit. The defendant alleged that relying on this representation, she and her family gave up possession of Lot 234 Mukim 15, moved to No 38A, erected their own house on it and incurred expenses in reclaiming part of the premises which was then

swampland. The defendant also argued that alternatively, the equity could be satisfied if the plaintiff were to pay her $80,000 being the costs of resettling her in a four-room Housing Development Board flat.

The trial judge found on the evidence before him that the defendant did not actually know the terms of the occupation of No 38A. Neither did she know the terms under which her husband was allowed to build the house at No 38A. In the circumstances, the trial judge found that the defendant was not a protected tenant of Lot 234 Mukim 15 and that no expectation that the defendant could stay at No 38A permanently had been created.

The trial judge ordered the plaintiff to pay the defendant $24,207 being the replacement cost of the defendant's house at No 38A before the plaintiff could recover possession. The defendant's claim for $80,000 was rejected.

The defendant's appeal to the High Court was allowed. The High Court held that:

(a) the trial judge had erred in concluding that no expectation was created by the plaintiff's predecessor in title that the defendant and her family could reside at No 38A permanently;

(b) the defendant had proved on the balance of probabilities that the circumstances of the case established the equitable estoppel alleged by her; and

(c) the equitable estoppel protected the defendant and her family's occupation of the premises permanently.

The High Court also accepted the defendant's submission that the cost of resettling the defendant would be $80,000. The plaintiff appealed against the decision of the High Court.

It was held, in allowing the appeal that:

(1) in cases such as this where the defendant raises equitable estoppel to restrict the plaintiff from exercising his legal rights as landowner, the proper approach is to inquire first, whether any equitable estoppel exists, and if so, the extent of the equity established by the estoppel, before next considering how best that equity may be satisfied;

(2) whether there is an equity and its extent will, in the normal case, depend simply on the initial conduct said to give rise to the equity, although the court may have to decide how, having regard to supervening circumstances, the equity can best be satisfied. If the equity so requires, the court may declare the defendant to be entitled to possession until his outlay is repaid, or even for so long as he wishes;

(3) the general principle is that an estoppel arises where one party (A) makes a representation or promise to another (B) intending (B) to act in reliance on the representation or promise, and (B) does so act to his detriment. (A) will then be estopped from acting inconsistently with his representation or promise;

(4) the finding of fact in question in this case relates to a finding of a specific fact, that is, whether the representation as alleged by the defendant had been made, and not to the drawing of an inference;

(5) a distinction must be drawn between a judge's finding of a specific or primary fact based on conflicting testimony, and the inferences to be drawn from undisputed facts or facts deposed to by witnesses and found by the court. While an appellate court might be more willing to form an independent opinion upon the proper inference to be drawn, it would always be extremely reluctant to reject a finding by a judge of a primary fact deposed to by witnesses especially when the finding is based on the credibility or bearing of a witness;

(6) the trial judge's finding that no expectation that the defendant be permitted to stay at No 38A permanently had been created must be restored;

(7) there was an equitable estoppel or an estoppel by acquiescence operating in favour of the defendant, thereby creating in her favour an equity which has to be satisfied before the plaintiff could recover possession;

(8) this equity could not extend to protecting the defendant's occupation of No 38A permanently. Neither would it therefore require that the defendant should be compensated with the costs of finding alternative accommodation in order that the equity may be satisfied. The extent of the defendant's equity was merely to protect her from eviction without being compensated for the money expended in erecting the house. The defendant's equity could therefore be satisfied if she were so compensated;

(9) the plaintiff should be entitled to possession of the premises upon payment of $24,207 and the defendant must vacate the premises by 31 May 1987.

Conditional leave to appeal to the Privy Council was granted to the respondent on 13 April 1987 but was subsequently struck out for want of prosecution. Having reviewed the facts of that case in detail, we had no hesitation in agreeing with the learned trial judge here that the facts there are quite distinguishable.

Learned counsel also referred to *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & Ors; Lesco Development Corp Sdn Bhd v Yap Chong Lan & Ors* [1984] 2 MLJ 123 where although it was held that the doctrine of estoppel cannot be established against the State Authority, that decision was flawed because the court failed to consider or distinguish between a challenge to the legal title and a claim based on equitable or promissory estoppel for just compensation arising from the acquiescence or implied consent of the State Authority to the occupation of the said land.

The facts in that case was that the respondents who were living in houses built by them on land in Seremban for which they paid ground rent to the registered proprietor were informed that the land had been acquired by the State Government for a road widening project. The respondents

A appealed to the Collector for time to vacate and either for low cost houses or State land. Subsequently, they were offered and agreed to accept varying amounts by way of compensation and were also realloted lots of land in Ulu Temiang for resettlement. They submitted applications for State land in that area. The lots allotted to the respondents were demarcated by wooden pegs and they were permitted by the collector to build their houses on their respective lots.

In the event, not only were the respondents given no title but the land occupied by them was alienated to Lesco for term of 99 years. Lesco was to develop the land into a housing estate and accordingly called on the respondents and other families settled on the land to quit and deliver possession of the parts occupied by them and to demolish and remove the buildings erected thereon. An offer was made for compensation and an option to purchase a low cost house in the proposed housing estate at a reduced price and temporary accommodation in the meanwhile. Several families resettled on the land accepted the offer but the respondents refused and instituted proceedings against the appellants.

Two main issues were raised in the proceedings. They were whether the respondents have acquired an equitable right or interest to remain on the respective lots allocated to them and whether the alienation of the land in question to Lesco was bad in law and therefore void.

A preliminary objection was also raised to the joinder of the State Government as a party to the proceedings. Peh Swee Chin J (as he then was) who heard the action, held on the preliminary objection that because of the various declarations sought against it, the State Government should be a proper and necessary party. On the first issue, he held that the doctrine of equitable estoppel arose and was binding on Lesco. To satisfy this equity, he ordered Lesco to pay monetary compensation to the respondents and that, on payment of such compensation, the respondents were to quit and vacate the land. The appellants appealed against this order. The respondents cross appealed on the finding of the learned judge on the second issue that the alienation of the land in question to Lesco was not illegal or void.

It was held on appeal that the State Government as such has nothing to do with proceedings under the National Land Code 1965 ('the Code'). It is the State Authority that is the pertinent entity. The State Government should never have been joined in the proceedings and on the preliminary objection taken, it should have been discharged as a party thereto.

The Federal Court (Abdul Hamid CJ (Malaya), Wan Suleiman and Abdoolcader FJJ) also ruled that the compelling provisions of s 64 of the Code can hardly be said to be merely directory and the phraseology of the provisions of sub-s (2) thereof clearly connotes a mandatory requisition which necessitates compliance therewith before a reservation can be said to have been revoked. Until and unless revocation has been effected under s 64 of the Code, reserved land will continue as such.

They further held that in view of the minimal area of the land which is reserved, the fact that it is possible to sever the parts reserved from the

rest of the land alienated and the fact that the reservation can be revoked at any time and even retrospectively, the court would exercise its discretion to refuse to declare the alienation of the land to Lesco to be invalid. A

It was also their finding that the equity sought to be raised by the respondents against the State Authority would establish rights in respect of State land which it is prevented by statute from creating other than in the prescribed manner. The application of the doctrine of equitable estoppel and the injection of equity in the circumstances were misconceived. Accordingly, the respondents' claims for relief were dismissed. B

It may be relevant to refer to some authorities pertaining to O 89 of the Rules and distinguish the facts. In *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343, the forefathers of the appellants and other unnamed occupiers were pioneeer settlers of the agricultural land in dispute. The appellants alleged that between 1971 and 1976 they and the others applied to the State Authority for titles of the said land. There was evidence by affidavit and documentary exhibits to show that the Selangor State Executive Council had approved the alienation of the said land to the appellants and other selected settlers and on 1 November 1980, a member of the State Executive Council confirmed the approval and assured them that they would be given titles to the said land. Following the policy of the State Government that only genuine and landless farmers would be given the land, only temporary occupation licences were granted to the farmers, on the understanding that separate titles to the land would be issued provided they continued to cultivate the land and remained with landless status. C D E

The appellants contended that after the expiry of the temporary occupation licence period in 1984, since they and the other farmers had satisfied the conditions imposed by the respondent, they have acquired a legal right or an expectation to be issued with land titles. The respondent, however, thought fit to hand over the lands to the Federal Land Consolidation and Rehabilitation Authority (FELCRA). The respondent on behalf of the State Government applied summarily under O 89 of the Rules for possession of the land without even offering any compensation relating to the eviction of the appellants and others from the land. The question at issue was the propriety of the application of the said O 89 to the facts and circumstances of this case. The learned High Court judge allowed the application of the respondent and the appellants appealed. F G

It was held in allowing the appeal that the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, if not all, of the farmers have occupied the said land for three years under licence and thereafter have remained in occupation with the continued consent of the State Government by virtue of the alienation already approved prior to the temporary occupation licences. H I

The Supreme Court (Lee Hun Hoe CJ (Borneo), Mohd Azmi and Harun Hashim SCJJ) also said that there are issues to be tried in this case which are not suitable to be decided by affidavit evidence. The case should

not therefore have been dealt with summarily under O 89 of the Rules and that, for the purpose of the summary procedure under O 89, a distinction should be made between squatters simpliciter who have no rights whatsoever and occupiers with licence or consent, as well as tenants and licensees holding over.

Finally, they held that in that case, the respondent has also failed to comply with r 3(b) of O 89 by his failure to disclose fully in its affidavit in support, the whole of the relevant circumstances how the lands came to be occupied by the appellants both before and after the three-year period of temporary occupation licences and why the approval of the Executive Council to the alienation of the lands to the farmers was neither exhibited nor implemented.

It is relevant to point out here that *Bohari*'s case is similar to the position taken by a previous panel of this court in *Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 2)* on 20 September 1996 when they held that the issue needed to be determined at a full trial. Perhaps, if s 5 of the Code had been pointed out to them, they might have reached a different conclusion. It is also relevant to mention that the application for leave to appeal against that decision was dismissed by the Federal Court (Eusoff Chin Chief Justice, Peh Swee Chin and Wan Adnan FCJJ) on 22 February 1997.

Other authorities included in the appellants' bundle of authorities and relied on by their learned counsel in his submissions are, in our view, of no relevance to the issue before us, for example, *Devi v Francis* [1969] 2 MLJ 169 deals with a landlord and tenant relationship as regards a building on land subject to a monthly tenancy which had been purchased under an agreement giving a clear expectation of a right to purchase the land raising the question of an equitable doctrine of irrevocable licence.

In *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321, also a landlord and tenant situation, the issue was whether a tenancy coupled with equity can be determined by a bare notice to quit.

The Privy Council decision of *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133 concerned the equity or equitable estoppel protecting the occupation by a tenant of the premises for the total period of the 30-year lease agreed to between the parties.

In his judgment, the learned trial judge in the present appeal said:

> There is also another reason. A person seeking remedy in equity must come with clean hands. It is clear the defendants have been in breach of the Code punishable under s 425 thereof. The defendants cannot be said to have come with clean hands. That the State Authority had not acted against the defendants cannot mean the State Authority has given consent. Such argument cannot stand in the face of the clear provision that no title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever: s 48. Adverse possession cannot become a bar to the recovery of possession by the proprietor or any person having an interest therein s 341.
>
> The Code specified the procedure to obtain title or temporary occupation licence, and no evidence has been advanced that any of the defendants in

this case had made either application. Mention is made by a witness that an application for a temporary occupation licence was made by a committee in 1991, but no evidence of the application, and in respect of whom, has been advanced.

Even if there is an application and that application was made on behalf of each and every one of the defendants in this case, the mere submission of an application can never amount to consent by the State Authority to occupation until in the approval and licence is issued since the Code makes no provision for any provisional occupation until approval or licence is issued. In this regard, s 73(3) [s 78(3)] gave the true principle under the Code: alienation takes effect only upon registration notwithstanding earlier approval. That the registration means everything in the Torrens system has been emphasized by the Federal Court in *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7. Mere approval itself is therefore insufficient. By the same token in the case of temporary occupation licences, the right to occupy arises only when the licence is issued.

Section 13 of the Code provides that the State Authority may by notification in the *Gazette* delegate to the State Director, or to the Registrar, or to any Land Administrator or other officer appointed under sub-s (1) of s 12, the exercise or performance, subject to such conditions and restrictions as may be prescribed in the notification, of any powers or duties conferred or imposed on the State Authority by or under the Code. There is no evidence, however, of any such delegation in this instance.

It is also relevant to refer to s 40 of the Code which vests solely in the State Authority the entire property in all State land within the territories of the State and all minerals and rock material within or upon any land in the State the rights to which have not been specifically disposed of by the State Authority.

Order 89 r 1 of the Rules categorically states that where a person claims possession of land which he alleges is occupied solely by a person or persons, not being a tenant or tenants holding over after the termination of the tenancy, who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of that Order.

It is clear that by taking all these actions, the respondent is against anyone claiming possession of the land occupied without their licence or consent. As for the predecessor in title which is the State Authority, the definition at s 5 of the Code denotes that the consent or licence can only come from the Ruler or Governor, as the case may be, and as the land here is situated in the State of Selangor, it must mean the Ruler.

And the Ruler, by virtue of cl 55 of the Selangor State Constitution, must act on the advice of the State Executive Council except for certain functions which he may act in his discretion. By cl 50 of that State Constitution, the executive authority of the State shall be vested in the Ruler but executive functions may by law be conferred on other persons or authorities. A licence or consent from any other person, therefore, as in this case, be it the local government official, land administrator, district

officer, Minister, member of Parliament, State Assemblyman or anyone else in a position of authority certainly would not suffice.

In *Sidek bin Haji Muhamad & Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313, some of the appellants came to Telok Anson from Kedah, North Perak and Selangor and opened up a large part of a jungle area. They were squatters and later other squatters joined them. There was a meeting between the squatters and government officers in which it was alleged that the State Director of Lands and Mines said that each settler family would receive five acres of padi land. There were also articles in the Utusan Melayu, quoting Bernama as the source, stating that the State Government was prepared to open up about 10,000 acres of land to be developed by the squatters. Eventually, some of the squatters were given three acre lots but others including the appellants were not successful. The appellants were given notice to stop work and to vacate the area. The appellants brought an action for a declaration that they were entitled in law and in equity to be in possession of the respective lots originally pioneered, opened up and occupied by them. The respondents applied under O 18 r 19 of the Rules to strike out the appellants' action on the grounds that they were squatters and that it was within the sole discretion of the State Government to alienate land. The learned judge in the High Court allowed the application and the appellants appealed.

The Federal Court (Raja Azlan Shah CJ (Malaya), Salleh Abas FJ and Abdoolcader J) held that:

(1) it is clear beyond doubt that the appellants have no cause of action against the respondents and they cannot succeed because they are squatters. Squatters have no right either in law or in equity;

(2) illegal occupation of State land is an offence under s 425 of the Code. It is well established that a court of equity will never assist squatters to resist an order of possession illegally acquired and it will never intervene in aid of wrongdoers;

(3) in this case, what was said by Bernama did not bind the government. Neither did the State Director of Lands and Mines have authority to bind the Government to alienate land to the squatters;

(4) the only way to obtain State land is by way of the Code. The case falls within the broad principle that where an Act creates an obligation and empowers the obligation in a specified manner, it is a general rule that performance cannot be enforced in any other manner.

In these circumstances, we unanimously agreed with the learned trial judge that all promises made to the appellants, who had never been given any temporary occupation licence by the State Authority, in whatever manner, by either the district officer, village headman, elected representative or the like, indicating that they had a right to occupy or continue to occupy the said land falls short of the requirement of the licence and consent from the State Authority as defined in s 5 of the Code.

The learned trial judge had concluded:

Cases of this nature always carry a heavy emotional burden. It is not unnatural to develop an emotional attachment to an abode, no matter how humble, that one has lived in for some time. Secondly, the persons usually involved to be evicted are more often than not from the lower economic scale who had moved in onto State land without licence or title. The court is not unknowing of these socio-economic issues. But the issues themselves do not create legal or equitable rights. No one can fail to appreciate that one cannot obtain or acquire rights merely by moving in. It would encourage and reward the brazen to move in on every piece of empty State land, while those who follow the provisions of the Code will be disadvantaged. Such a position is wholly indefensible. The greater good of the society is better served by a orderly adherence to the provisions of the law, in this case, under the National Land Code 1965. The plaintiffs having duly obtained clear registered title to the said land, it would also be unjust for the court to be generous to the defendants with the rights of the plaintiff. To do so would be lending the assistance of the court to those who by unlawful occupation of the land hold to ransom registered owners unless they are paid off.

As we were of the same view as the learned trial judge in the instant appeal as well as the trial judge who heard the application for the injunction and the trial judge who heard the O 14 application, despite the valiant attempts by learned counsel for the appellants to impress us with his research on this point, we did not even call learned counsel for the respondent to reply.

The appeal was accordingly dismissed with costs and the deposit is to go to the respondent to the account of their taxed costs.

Just for the record, the application for leave to appeal against the decision of the Court of Appeal in *Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1 on 14 August 1995 as regards the stay of execution was dismissed by the Federal Court (Eusoff Chin Chief Justice, Wan Adnan CJ (Malaya) and Edgar Joseph Jr FCJ) on 16 February 1998 as none of the parties were present. Subsequently, the application for stay of execution consequent to our decision in this appeal was decided by this Court (Abu Mansor and Ahmad Fairuz JJCA, NH Chan JCA dissenting) on 6 March 1998 to the effect that it has jurisdiction to grant a stay of its order pending the disposal of the appellants' application to the Federal Court for leave to appeal.

Appeal dismissed.

Reported by Loo Lai Mee